



The Administrative Law Judge awarded claimant benefits for a scheduled injury to the left lower extremity. The Administrative Law Judge also ordered the Workers Compensation Fund to pay a portion of the Award. Claimant requested this review and contends claimant is entitled to permanent partial general disability benefits because he subsequently injured or aggravated his right knee as a result of overcompensating for the injured left leg. At oral argument, the Workers Compensation Fund raised the issue of Fund liability. The issues now before the Appeals Board are:

- (1) The nature and extent of disability; and
- (2) Liability of the Workers Compensation Fund.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified. Claimant is entitled to permanent partial general disability benefits based upon an impairment of function rating of eighteen percent (18%) to the body as a whole, and the Workers Compensation Fund has no liability in this proceeding.

(1) Claimant injured his left knee on October 18, 1991 when he stepped on an air hose at work and twisted his leg. Claimant was treated by Alan L. Kruckemyer, M.D., who diagnosed a torn medial meniscus and performed arthroscopic surgery to the left knee in December, 1991. Claimant was released to return to work in January, 1992 and progressively developed symptoms in his right knee.

The Appeals Board finds it is more probably true than not that claimant permanently aggravated a preexisting degenerative condition in the right knee as a result of overcompensating for the injured left knee. In addition to claimant's testimony, this finding is also based upon the testimony of both Gary L. Harbin, M.D., and Ernest R. Schlachter, M.D. After the arthroscopic surgery in December, claimant limped and protected the injured left knee. As a result, claimant began to experience increased symptoms in the right knee. Claimant advised the respondent of his right knee complaints and also advised Dr. Kruckemyer who ignored them. Dr. Kruckemyer released claimant in August, 1992 but claimant continued to experience problems in both knees. Because of these continuing symptoms, claimant on his own sought treatment from Dr. Joyce, an orthopedic specialist in the Kansas City area who is also team physician for the Kansas City Chiefs and Kansas City Royals.

In 1990, Dr. Harbin operated on claimant's right knee and at that time rated claimant as having a twenty-one percent (21%) functional impairment to the right lower extremity. Dr. Harbin testified that he last saw claimant in June, 1991 and that claimant's knee at that time was extremely susceptible to injury and that any injury would substantially aggravate it. Although he had not seen claimant since 1991 and, therefore, could not testify regarding any injury claimant has sustained since that time, Dr. Harbin did testify that placing additional weight on the right knee should have aggravated the preexisting degenerative condition. At pages 15 and 16 of Dr. Harbin's deposition, the doctor states:

"Q. Doctor, considering this gentleman's condition the last time you saw him, in June of 1991, in your opinion would his condition at that

time make him more susceptible for additional injury in the future to that particular knee?

A. It could make him slightly more susceptible to injury, but what it does make him supersusceptible to is that a lesser degree of injury can cause a larger magnitude of symptoms and larger and more rapid deterioration, depending on how he injures it, again, the severity of the injury still is important."

Dr. Schlachter examined claimant on June 25, 1993 and testified claimant had a preexisting impairment in the right knee before October, 1991 and that claimant aggravated the right knee for overcompensating for the injured left knee. Dr. Schlachter believes claimant has a twenty-five percent (25%) permanent partial impairment of function to the left lower extremity and a twenty percent (20%) permanent partial impairment of function to the right lower extremity which convert to an eighteen percent (18%) functional impairment to the body as a whole. He believes claimant will continue to overcompensate for the left knee injury as long as he lives.

Dr. Kruckemyer testified that he cannot say whether claimant injured his right knee after October, 1991 because he never examined it. From Dr. Kruckemyer's testimony, it is clear he focused on claimant's left knee because that was the reason claimant was referred to him for treatment. Although he did not examine or treat the right knee, Dr. Kruckemyer's office notes reference complaints to the right knee on December 24, 1991, which notation to the right knee may be a typographical error, and reference bilateral knee complaints on January 31, 1992 and June 28, 1993.

Based upon the above evidence, the Appeals Board finds claimant has proven he has sustained bilateral knee injuries as a result of his work-related accident on October 18, 1991. Respondent contends claimant failed to prove he has sustained additional injury to the right knee because Dr. Harbin's rating to the right lower extremity from 1990 was twenty-one percent (21%) and Dr. Schlachter's present rating is twenty percent (20%). The Appeals Board does not agree. As Dr. Schlachter testified, he believes he and Dr. Harbin use different systems in rating impairment. Also, Dr. Schlachter testified that he believes claimant had a ten to fifteen percent (10-15%) functional impairment to the right lower extremity before the left knee injury and that it has now increased to twenty percent (20%). Dr. Harbin testified after reviewing Dr. Schlachter's findings from the June, 1993 examination that he might increase claimant's functional impairment rating by a couple of percentage points if those findings were accurate. Despite this question about the impairment ratings, claimant has established he has either aggravated or reinjured the right knee as a direct and natural result of the left knee injury.

Because he has sustained a "nonscheduled injury," claimant is entitled permanent partial general disability benefits under the provisions of K.S.A. 1991 Supp. 44-510e. The statute provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except

that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment.”

Claimant neither requests nor contends he is entitled to a work disability. Therefore, claimant's permanent partial disability benefits are to be based upon the eighteen percent (18%) impairment rating provided by Dr. Schlachter as it is the only whole body functional impairment rating that has been introduced into evidence.

(2) The Workers Compensation Fund bears no responsibility in this proceeding. The Appeals Board finds it is more probably true than not that the right knee injury and aggravation occurred as a result of overcompensating for the left knee and, therefore, the right knee injury developed as a direct and natural consequence of the initial left knee injury. Although claimant is entitled to workers compensation benefits under the Workers Compensation Act for injury to the right knee, the evidence does not establish that the right knee injury constitutes a subsequent work-related injury for which the Workers Compensation Fund would be liable.

The purpose of the Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, totally or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 487, 548 P. 2d 765 (1976).

K.S.A. 44-566(b) (Ensley) provides:

“‘Handicapped employee’ means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

. . .

(15) Loss of or partial loss of the use of any member of the body;

(16) Any physical deformity or abnormality;

(17) Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment.”

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 1991 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury probably or most likely would have sustained without regard to the preexisting impairment but the resulting

disability or death was contributed to by the preexisting impairment. See K.S.A. 1991 Supp. 44-567(a)(2).

In either situation, it is the respondent's responsibility and burden to show that it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1991 Supp. 44-567(b) provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to his former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P. 2d 98 (1987), aff'd 242 Kan. 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan v. Inter-Collegiate Press, *supra*.

Although provisions imposing liability upon the Workers Compensation Fund are to be liberally construed, the Workers Compensation Act should be interpreted in such a manner as to carry out its primary and basic purposes. The Legislature created the Workers Compensation Fund for the basic and primary purpose of encouraging the employment of impaired individuals. Assessing liability against the Fund in situations where that primary purpose is not furthered is improper.

Regarding the respondent's argument that the Workers Compensation Fund should be responsible for a portion of the Award because of the subsequent right knee injury, the Appeals Board finds that contention must fail. Liability can only be assessed against the Workers Compensation Fund when an employee sustains a subsequent, work-related accident. The Workers Compensation Fund is not responsible for the natural and probable consequences or progression of an earlier injury unless it somehow constitutes a subsequent accident. The evidence now before us indicates claimant's right knee worsened as a result of overcompensating for the left knee. The evidence fails to establish that the overcompensation occurred only at work, or primarily at work. The evidence, therefore, fails to establish that the right knee injury was caused by a subsequent work-related accident.

Because the evidence fails to prove the respondent had knowledge that claimant possessed an impairment to the left knee which constituted a handicap before the work-related accident on October 18, 1991, or that the right knee was injured as a result of a subsequent, compensable work-related accident, the Workers Compensation Fund is not responsible for any portion of the Award entered in this proceeding.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that claimant is entitled to receive permanent partial disability benefits based upon an 18% functional impairment rating; that the Workers Compensation Fund is absolved of liability in this proceeding; and that the respondent, Beech Aircraft Corporation, a qualified self-insured, is responsible for the entirety of the Award.

As of October 30, 1995, there is due and owing claimant 4 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$1,156.00, followed by 206.43 weeks of permanent partial disability compensation at the rate of \$58.47 per week in the sum of \$12,069.96, for a total of \$13,225.96 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$11,961.21 is to be paid for 204.57 weeks at the rate of \$58.47 per week, until fully paid or further order of the Director.

Claimant is entitled to future medical care and treatment upon proper application to the Director.

Claimant is awarded unauthorized medical expense up to the \$350.00 statutory maximum upon proof of payment.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 1991 Supp. 44-536.

Fees and expenses of the administration of the Workers Compensation Act are assessed against the respondent, a qualified self-insured, to be paid as follows:

OWENS, BRAKE & ASSOCIATES	
Regular Hearing Transcript	\$349.70
dated April 6, 1994	
Deposition of Dr. Gary Harbin	\$160.90
dated May 20, 1994	
Deposition of Dr. Alan Kruckemyer	\$199.00
dated May 20, 1994	
Total	\$709.60
KELLEY, YORK & ASSOCIATES, LTD.	
Deposition of Dr. Ernest Schlachter	\$294.78
dated April 14, 1994	

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 1995.

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BOARD MEMBER

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- c:     David H. Farris, Wichita, Kansas  
       Angela L. Rud, Wichita, Kansas  
       Scott J. Mann, Hutchinson, Kansas  
       George R. Robertson, Administrative Law Judge  
       Philip S. Harness, Director